



**Montana Fish,
Wildlife & Parks**

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March 24, 2010

Elena Kagan, Solicitor General
Office of the Solicitor General
950 Pennsylvania Ave., NW
Washington, D.C. 20530-0001

Dear Ms. Kagan:

On behalf of the State of Montana, the National Wildlife Federation, the Idaho Wildlife Federation, and the Wyoming Wildlife Federation, we write to urge the Solicitor General not to appeal Judge Molloy's Order in *Greater Yellowstone Coalition v. Servheen*, No. 07-cv-134, D-MT, 2009. There, Plaintiff Greater Yellowstone Coalition sought judicial review of the U.S. Fish and Wildlife Service's (FWS) decision to designate a Distinct Population Segment (DPS) for the Greater Yellowstone Area grizzly bear population and to remove the population from the threatened species list under the ESA.

The State of Montana and the Wildlife Federations have been involved in grizzly bear management for many years and diligently worked toward delisting the Yellowstone grizzly bear population. Because we believe that efforts to delist the bear provide a very strong foundation for grizzly bear management in the Greater Yellowstone, we intervened on behalf of the U.S. Fish and Wildlife Service in the litigation. In spite of our best efforts at the district court, in his Order of September 21, 2009, Judge Molloy found for the plaintiffs on two counts (1. there are inadequate regulatory mechanisms to protect the grizzly bear once it is delisted; and 2. the Service did not adequately consider the impacts of global warming and other factors on whitebark pine nuts – a significant grizzly food source) and for the defendant FWS on two counts (1. genetics, i.e., size and isolation of population; and 2. whether grizzlies can be considered recovered across a significant portion of their range). We recognize that Judge Molloy's decision set a high bar for the extent of regulatory commitments required for a species after delisting. However, an appeal on these issues is uncertain and a loss would cement a very difficult precedent. We strongly believe that FWS could better address the deficiencies in the final rule at the administrative level and eventually reissue a delisting rule. There are two major reasons to consider reworking the delisting rule.

1. **Prospects for success on appeal are not certain.** Judge Molloy found that the majority of the regulatory mechanisms relied upon by the FWS are unenforceable and uncertain to occur. Additionally, Judge Molloy stated the FWS failed to explain how the laws and regulations they rely upon will protect the Yellowstone Grizzly population. Defendants could certainly argue that Judge Molloy simply applied the wrong standard for the adequacy of regulatory mechanisms, but a favorable result on appeal is far from certain. Perhaps even more problematic is that Judge Molloy also found that the FWS did not adequately consider the impacts of global warming and other factors on whitebark pine nuts. This could be a difficult issue on appeal because the 9th Circuit may defer to Judge Molloy's decision – one that, compared to the regulatory mechanisms issued, is based more on the judge's read of the Administrative Record. The FWS argued, in essence, that grizzlies will adapt to the loss of whitebark pine and that the population has continued to grow as the whitebark has declined. Judge Molloy noted that this latter point was the FWS's best argument, but that the FWS had not relied on the continuing grizzly population growth in its delisting rule, so neither could he.

In addition to the uncertainty of the 9th Circuit reversing Judge Molloy's adverse decisions, there is a real danger of losing good precedent on appeal. Judge Molloy ruled in Defendants' favor on the "significant portion of range" issue and genetics. If the FWS appeals, it is likely that Plaintiff will appeal these two issues, and it is possible that the 9th Circuit will overturn valuable precedent.

2. **Judge Molloy's Order provides a strong indication of how to correct deficiencies in the delisting rule.** While Judge Molloy's Order placed the Yellowstone Grizzly back on the ESA's list of threatened species, it also provides a roadmap to crafting a successful delisting rule. This would require the following.

- a. Further documentation of the bear's ability to withstand loss of whitebark pine and further evidence of population expansion (or lack of population loss) in spite of whitebark pine loss. A new rule would have 3-4 more years of demonstrated grizzly bear population increases as the delisting rule was adopted in March of 2007.
- b. Further documentation of Forest Service commitment to Conservation Strategy habitat standards inside and outside the Primary Conservation Area.
- c. Further documentation of State commitment to population standards and mortality limits. This would likely include an administrative rule that not only ratifies state commitment to the Conservation Strategy, but also specifies actions that the states would take if certain population or mortality triggers are met. For example, Montana could make emergency closure of hunting districts due to bear activity mandatory and institute mandatory hunter education and practices in grizzly bear country. Idaho and Wyoming would need to adopt similar management rules.

Clearly, the FWS and the states would have considerable work to do. Yet, we feel that Judge Molloy has provided a strong indication of what needs to be done. If the FWS accepted the Court's invalidation and remand of the delisting rule and developed a new rule to address the Judge's concerns, there would be a number of benefits. The new rule's validity may be upheld by the Court and, if not, an appeal of a revised rule would have a greater chance of success and be less of a risk. Therefore, we urge you to strongly consider not appealing Judge Molloy's decision to the Ninth Circuit. Thank you.

Sincerely,



for Joe Maurier, Director
Montana Fish, Wildlife & Parks



Thomas France, Regional Executive Director
National Wildlife Federation

C: Ken Salazar
Tom Strickland
Roland Gould
Steve Guertin
Chris Servheen
Coby Howell
Allen Brabender